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THE ENTERPRISE IN TESTUDO FORMATION

The Protection Zone of Legal Privilege in German and US Penal Law[1]

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ABSTRACT

For companies legal privilege represents an essential bulwark against the state. In the case of internal investigations legal privilege is of prime importance to the companies. At crucial points of intersection the legal situation in the US differs from that of Germany. In the US, confidentiality is regarded with the aura of a Holy Grail, applying to in-house counsel and external lawyers alike. However, in Germany those privileges do not apply to in-house counsels and neither are they intended to apply to the corporate lawyer (so-called Syndikus). This is explained by Criminal Law policy arguments, which according to the author's opinion are not tenable. This essay represents solutions de lege lata and de lege ferenda, in order to at least include in-house lawyers (so-called Syndikus) within the scope of legal privilege. For this purpose, the author argues in favor of a partial adoption of the American way.

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1 This article is based on a presentation for the International Legal Ethics Conference VII: *The Ethics & Regulation of Lawyers Worldwide: Comparative and Interdisciplinary Perspectives* in New York City from 14th – 16th July 2016.

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A. Evolution of Criminal Business Law

In Western countries, Criminal Business Law has evolved with increasing momentum from an ameba into a dinosaur.[2] Whereas in 1949 Edwin Sutherland still posed the question as to whether deviant behavior in business is labeled as "crime" and falls under the jurisdiction of Criminal Law,[3] today businesses and the crimes of powerful economic agents are at the focus of public investigations and the public interest.[4]

The starting points for this are instances of re-criminalization and a stricter application of substantive Criminal Business Law.[5] The latter affect all subsectors of the economy in the already highly-regulated markets.[6] A general point of focus is the fight against corruption. In Germany too, criminal liability loopholes are currently being closed[7] and through implementation of an "overseas clause" the German legislator purports to be the

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2 White Collar Crime Act of 1949 (WiGBl. 1949, 193), Act Against the Restriction of Competition 1957 (BGBl. I 1957, 2114), White Collar Crime Prevention Acts of 1976/1986 (First White Collar Crime Prevention Act of July 29, 1976 (BGBl. I, 2034), Second White Collar Crime Prevention Act of May 15, 1986, (BGBl I, 721)), Securities Trading Act 1994 (BGBl. I 1994, 1759), Anti-Corruption Act of 1997 (BGBl. I 1997, 2038), Anti-Tax Evasion Act of 2001 (BGBl. I 2001, 3922).

3 cf. Edwin H. Sutherland, *Is White Collar Crime Crime? In:* White Collar Crime, 29 ff. (Edwin H. Sutherland 1949).

4 The ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK also dealt with the subject in its 10 years, cf. only: Matthias Jahn, *Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 453 (2011); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 508 (2011); Frank Peter Schuster, *Verwertbarkeit von Beweismitteln bei grenzüberschreitender Strafverfolgung*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 68 (2010); Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen,* ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378 (2013).

5 Forerunner: Sarbanes-Oxley Act 2002 (SOX). cf. also the US Federal statutes "Mail Fraud Statute" (2012), "Wire Fraud Statue" (2012), and "Anti-Kickback Act" (2012), which also are for the purpose of battling corruption, for more details: Jeffrey Boles, *Examining the lax treatment of commercial bribary in the united states: A prescription for reform*, AMERICAN BUSINESS LAW JOURNAL, 119 (2014); as well as in general regarding expansion of US Criminal Business Law: Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 363 f. (2011). Further Physician Payments Sunshine Act 2010, which contains prior offenses and provides for a duty of reporting to the relevant authorities with regard to donations of the pharmaceutical industry to Health Care Professionals which is subject to penalty upon violation.

6 Parallel to this development, a hyphenation effect has formed, e.g. Employment-Criminal Law, Capital Markets-Criminal Law, Medical-Criminal Law (Business Criminal Law for the doctor), Anti-trust-Criminal Law, Pharmaceuticals-Criminal Law, Environmental-Criminal Law.

7 Introduction of § 299a StGB, Reform of § 299 StGB, in detail: Hendrik Schneider, *Sonderstrafrecht für Ärzte? Eine kritische Analyse der jüngsten Gesetzentwürfe zur Bestrafung der „Ärztekorruption"*, ONLINEZEITSCHRIFT FÜR HÖCHSTRICHTERLICHE RECHTSPRECHUNG ZUM STRAFRECHT, 473 (2013).

guardian of foreign competition orders.[8] It is well known that the reach of US criminal law has been extended since the FCPA was passed in 1977.[9]

The same applies to the introduction of the UK Bribery Act on July 1, 2011[10], whose "offences" are so vague that the Ministry of Justice published guidelines for application of the law setting the perimeters of the new law for the businesses.[11]

Parallel to this, the risks of detection for occupational and corporate crime[12] have increased. A key role in this context is played by whistleblowing, which was taken to the extreme through Sec. 922 of the Dodd-Frank Act[13], but after having transcended initial resentment[14] is also increasingly being applied in Germany as a measure to make crime more visible and as a bottom up instrument of sustainable compliance.[15]

Ever since Enron and WorldCom in 2001 and 2002 and the subprime crisis in 2007[16] public opinion, which is the forerunner and pacesetter (buzzword: "political-journalistic reinforcement cycle"[17]) of punitive criminal law policy in the area of Criminal Business Law, has changed. Introduction of the SOX in 2002 was accompanied by the words of then

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8 *Günter Heine & Jörg Eisele*, *in* Strafgesetzbuch, § 299 No. 29a StGB (Adolf Schönke & Horst Schröder 29th ed. 2015); *Gerhard Dannecker*, *in* Strafgesetzbuch Bd.3, § 299 StGB, No. 74 (Urs Kindhäuser, Ulfrid Neumann & Hans-Ullrich Paeffgen, 4th ed. 2013).

9 Regarding the historical context of the FCPA, cf. *Hendrik Schneider*, *in* Wirtschaftsstrafrecht, § 3 No. 498 (Hauke Brettel & Hendrik Schneider 1st ed. 2014), as well as in detail Hartmut Berghoff, *From the Watergate Scandal to the Compliance Revolution: The Fight against Corporate Corruption in the United States and Germany*, BULLETIN OF THE GHI, 7 (2013); for a historical overview of the expansion of US Criminal Law see: Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 363 f. (2011).

10 Jochen Deister & Anton Geier, *Der UK Bribery Act 2010 und seine Auswirkungen auf deutsche Unternehmen*, CORPORATE COMPLIANCE ZEITSCHRIFT, 12 (2011).

11 Jochen Deister & Anton Geier, *Der UK Bribery Act 2010 und seine Auswirkungen auf deutsche Unternehmen,* CORPORATE COMPLIANCE ZEITSCHRIFT, 81 (2011).

12 MARSHALL R. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY, 130 ff. (1967).

13 The entire text of Section 922 can be retrieved at https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.; cf. also: Caitlin Hickey, *Incentivizing Whistleblowing in the United States Qui Tam, Anti-Retaliation and Cash-For-Information*, NEUE KRIMINALPOLITIK, 388 (2015).

14 Exemplary here *Thomas Lampert, in* Corporate Compliance: Handbuch der Haftungsvermeidung im Unternehmen, § 9 No. 35 (Christoph E. Hauschka et al. 2nd ed. 2010); *Frank Maschmann, in* Handbuch der Korruptionsprävention, 138 ff. No. 125 ff. (Dieter Dölling et al. 2007); regarding the status of the Rotsch debate, Criminal Compliance, § 2 Rn. 28 ff. (Thomas Rotsch 2015).

15 ESTHER PITTROFF, WHISTLE-BLOWING-SYSTEME IN DEUTSCHEN UNTERNEHMEN EINE UNTERSUCHUNG ZUR WAHRNEHMUNG UND IMPLEMENTIERUNG (2011); HENDRIK SCHNEIDER & DIETER JOHN, DAS UNTERNEHMEN ALS OPFER VON WIRTSCHAFTSKRIMINALITÄT (2013).

16 Regarding the analysis of international criminology against the backdrop of the subprime crisis, *Hendrik Schneider, in* Festschrift für Wolfgang Heinz 661, (Eric Hilgendorf & Rudolf Rengier 2012).

17 Sebastian Scheerer, *Der politisch publizistische Verstärkerkreislauf. Zur Beeinflussung der Massenmedien im Prozess strafrechtlicher Normgenese*, KRIMINOLOGISCHES JOURNAL, 223 (1978). (Analysis of International Criminology Against the Backdrop of the Subprime Crisis).

President George W. Bush: "The era of low standards and false profits is over ... no boardroom in America is above or beyond the law... No more easy money for corporate criminals, just hard time."[18] These statements were backed by creation of a *Corporate Fraud Task Force* to step up the intensity of prosecution of white collar crime.[19]

In Germany as well, there are predominant calls for stricter prosecution of white collar criminals and "tax evaders". Criminal law experts, criminologists,[20] practitioners, politicians[21] and other economic agents[22] predominantly support this process. They participate in public discourse as *moral entrepreneurs*[23]. They demand strict measures,[24] advocate the extensive interpretation of existing regulations on grounds of Criminal Law policy,[25] scandalize the violation of norms,[26] demonize perpetrator legal entities[27] and regard the

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18 Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud In Corporations*; in: THE NEW YORK TIMES (July 31, 2002).

19 cf.: Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54, BOSTON COLLEGE LAW REVIEW, 73, 83 f. (2013).

20 In this context Marxist-leaning approaches which attack the market economy as an economic system dominate ("greed-is-good mentality"; Predatory Society), cf. e.g PAUL BLUMBERG, THE PREDATORY SOCIETY. DECEPTION IN THE AMERICAN MARKETPLACE (1989); further James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93, AMERICAN JOURNAL OF SOCIOLOGY, 406 (1987); summary JAMES WILLIAM COLEMAN, THE CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME, 193-233 (6th ed. 2006).

21 cf. press release by the SPD party by Johannes Fechner (Member of Parliament), "Korruption im Gesundheitswesen beenden." retrievable at: http://www.spdfraktion.de/presse/pressemitteilungen /korruption-im-gesundheitswesen-beenden, as well as the website of the Member of Parliament Kathrin Vogler (Die Linke), retrievable at: http://www.kathrin-vogler.de/themen/gesundheit/korruption/details/zurueck/aerztekorruption/artikel/korruption-im-gesundheitswesen-die-krebsmafia/.

22 e.g. Transparency International.

23 HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE, 147 ff. (1966).

24 Paradigmatic Thomas Fischer, ZEITSCHRIFT FÜR MEDIZINSTRAFRECHT 1, 1 f. (2015): "Corruption in the healthcare system, in particular in the contract doctor system, must finally be made prosecutable and consistently prosecuted. Only after several dozen doctors and distributors have actually been sentenced and have been deprived of their careers will the message that gang-like corruption to the detriment of the public and its weakest members will not be tolerated." And: "unscrupulous enrichment at the expense of society which significantly defines the healthcare market "; see also: Cornelia Gaedigk, *Kein Sonderrecht für Ärzte – ein Einwurf aus Sicht der Ermittlungspraxis*, 5, ZEITSCHRIFT FÜR MEDIZINSTRAFRECHT, 268 (2015).

25 e.g.: Oliver Pragal, *Das Pharma-„Marketing" um die niedergelassenen Kassenärzte: „Beauftragtenbestechung" gemäß § 299 StGB!*, 5, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 133 (2005); THOMAS FISCHER, STRAFGESETZBUCH, § 299 No. 10e StGB (62th ed. 2015).

26 In Germany hyphenated terminology has established itself in this context: Arzneimittel-Skandal, Organspendeskandal, Pflegeskandal or the name of the affected company is used, e.g. Ratiopharm-Skandal, cf..: DER SPIEGEL ONLINE, Ratiopharm-Skandal: "Das erschüttert den Glauben an den Rechtsstaat", in: http://www.spiegel.de/wirtschaft/service/ratiopharm-skandal-das-erschuettert-den-glauben-an-den-rechtsstaat-a-648892.html. (Ratiopharm Scandal: "Undermining Faith in the Rule of Law").

27 Pamela H. Bucy, *Coporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75, MINNESOTA LAW REVIEW, 1095, 1157 (1991); a differentiated reconstruction of this approach can be found in Alschuler, who i.a. presents the view advocated by Beale (follows below), Albert W. Alschuler, *Two ways to think about the punishment of corporation,* 46, AMERICAN CRIMINAL LAW REVIEW, 1359, 1369 (2009): "The entity can be evil although the people who comprise it are mostly good. (...) the entity has not only an ethos, but a soul. The devils inside it must be exorcised despite the human cost".

facts of a case as a criminal offense which has not yet been solved.[28] In this spirit, the judges increasingly gravitate towards incarceration of "corporate criminals" and toward imposition of Draconian company penalties, [29] where the respective legal system provides for such an instrument or an equivalent (economic "forfeiture" in German Criminal Business Law[30]).[31]

B. The Defense Strategy of the Businesses- the Significance of Internal Investigations in Punitive Criminal Business Law

The depicted development naturally did not pass over the businesses without any impact. Investigation proceedings against the competitors are perceived as a "ticking time bomb".[32] It is expedient to prepare for investigations, to have an effective defense. In short: Businesses all over the world have set themselves up in a testudo formation in an attempt to effectively defend themselves from the attacker in the shape of a strong state and its investigation authorities (similar to the well trained Roman legionnaires when using the "*scutum*"). The name of the ever-so ponderous bulwark is Compliance and has at least the latent function[33] of shielding the business from government encroachment, preventing corporate misconduct from the start or at least making it internally visible and retaining the defining authority over cases relevant in Criminal Law.

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28 cf. the reports in the media on the DRK clinic scandal, cf.: "DRK-Skandal So lief die Abzocke", (DRK Scandal: This Is How the Rip-Off Happened) retrievable at: http://www.berliner-kurier.de/berlin/polizei-und-justiz/drk-skandal-so-lief-die-abzocke-4543444.

29 For example, the British pharmaceutical company GSK in China was fined 491 million dollars in China, cf.: Thomas Fox, *GSK in China: A New Dawn in the International Fight Against Corruption*, 1, COMPLIANCE ELLIANCE JOURNAL 29, 41 (Vol. 1 No. 1 2015), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176485; the CEO of Worldcom Bernie Ebbers was sentenced to 25 years of incarceration at age 63 on grounds of accounting fraud, see http://www.capital.de/themen/der-worldcom-skandal.html (retrieved on March 16, 2016).

30 Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378, 379 (2013) referring to qualitative Interviews: "Nowadays there are 'hitlists' regarding which prosecuting attorney can show the greatest adsorption volume. This is a mindset that was totally irrelevant when I [...] started out with legal defense. Looking at it this way [...] prosecuting attorneys have now also become business enterprises".

31 In detail *Hendrik Schneider*, *in*: Matthias Jahn & Charlotte Schmitt-Leonardy & Christian Schoop (publ.), DAS UNTERNEHMENSSTRAFRECHT UND SEINE ALTERNATIVEN, 25 (2016)

32 cf. Burkhard Boemke et. al, *Evidenzbasierte Kriminalprävention im Unternehmen. Wirksamkeit von Compliance-Maßnahmen in der deutschen Wirtschaft – Ein empirisches Forschungsvorhaben*, 9, DENKSTRÖME, 79 (2012); Hendrik Schneider & Kevin Grau & Kristin Kißling, *„Der Schock von Berlin saß tief!" Ergebnisse eines empirischen Forschungsvorhabens zu Compliance im Gesundheitswesen und der Pharmaindustrie,* CORPORATE COMPLIANCE ZEITSCHRIFT, 48 (2013).

33 In detail: KRISTIN KIßLING, DIE LATENTE FUNKTION VON COMPLIANCE. (2016); Michele DeStefano, *The Chief Compliance Officer - Should there be a new "C" in the C-Suite?,* THE PRACTICE (July 2016), retrievable at: https://thepractice.law.harvard.edu/article/the-chief-compliance-officer/.

One key means of the repressive arm of Compliance[34] are "internal investigations".[35] These are investigations carried out by the business or by a hired agent in the case of suspicion of breaches of the law or other legal violations.[36]

The function of the internal investigations varies depending on the question of whether the facts to be determined are already the subject of government investigation proceedings. In the case of ongoing investigation proceedings, searches (still legal in compliance with the rule of reasonableness[37]) may be prevented by the internal investigations.[38] Evidence may be provided to the authorities under supervision. In this way, a certain degree of control by the business is retained in the proceedings. Moreover, the (customary) public guarantee of extensive internal solution of the case[39] is a means of limiting reputation damage and diverting the accusation from the delinquent corporate structure to the individual criminal employee, i.e. from a failure of the system to an individual transgression. Outside of government investigation proceedings, internal investigations provide the opportunity of detecting incriminating conduct and subjecting it to the judgment of an entrepreneurial decision (to continue or to modify the business activity that has been acknowledged or is regarded as relevant in Criminal Law?). It is part of risk screening and risk management and prepares internal sanctions against the perpetrators. Internal investigations provide the freedom to make a decision as to whether and in what way (criminal prosecution or "only" an Employment Law measure) to react to a detected violation.[40] Where instated immediately in the case of existing grounds of suspicion, the business is prepared if government proceedings should be taken. Moreover, an external or internal

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34 Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 77 (Vol. 1 No. 1 2015), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443; Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378, 384 (2013).

35 The emergence of Internal Investigations was backed differently by academia and practice in Germany and the US, in Germany the attitude toward internal investigations tended to be suspicious and unfavorable: clear skepticism at Gina Greve, *Privatisierung behördlicher Ermittlungen,* STRAFVERTEIDIGER FORUM, 89 (2013) with further references; in contrast, the attitude in the US was embracive from the start: cf. Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 364 (2011), with reference to relevant case law.

36 cf. JOSEPHINE SCHARNBERG, ILLEGALE INTERNAL INVESTIGATIONS, 27 (2015); cf. also Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings,* COMPLIANCE ELLIANCE JOURNAL, 26, 29 f. (Vol. 2 No. 1 2016), retrievable at http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168; showing the initial situation upon instatement of an Internal Investigation: Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54, BOSTON COLLEGE LAW REVIEW, 73 (2013).

37 Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 87 (Vol. 1 No. 1 2015), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443.

38 Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings,* COMPLIANCE ELLIANCE JOURNAL, 26, 34 (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168.

39 *Klaus Moosmayer, in* Interne Untersuchungen, 3 (Klaus Moosmayer & Niels Hartwig 2012).

40 cf. Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings,* COMPLIANCE ELLIANCE JOURNAL, 26, 30 (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168.

whistleblower is likely to refrain from criminal prosecution if he recognizes that the company has already adequately responded to the offense reported by him.

II. THE ROLE OF THE IN-HOUSE COUNSEL - GERMAN AND INTERNATIONAL PERSPECTIVE

A. Involvement of the in-house counsel in internal investigations

In-house counsels, who are frequently corporate lawyers, are directly involved in internal investigations. Klaus Moosmayer, Chief Counsel Compliance of Siemens AG, summarizes it as follows:

"Either a corporate lawyer with the relevant expertise or an external lawyer hired for the purpose may participate as a representative of the company in the investigations. It must be taken into account here that even where an external law firm is hired for the internal investigations the function of coordinator is always required within the company, which is normally performed by a lawyer from the internal Legal and/or Compliance department. Without this "project office", investigations performed by external professionals in the company will hardly be able to be performed within an acceptable period and at reasonable costs." [41]

Nothing could be truer. The fact that internal investigations have developed into a lucrative market for external providers is not to be underestimated. The problem of the limits on internal investigations exists in particular where the company promised to solve the case completely, as is often the case. External providers of "forensic services" take advantage of this and conclude their reports with a statement that further investigation of the case is necessary, not only to avoid liability risks. Moreover, the external specialists are often not lawyers but former police officers, economists or IT specialists. They need to submit the investigations to legal guidance with regard to the applicable Criminal Law provisions to the facts of the case. Failing this, there is a risk that the investigations become trivial or extend to facts which have already lapsed under the statute of limitations. To this extent, in-house counsels fill an important interdisciplinary function. They coordinate the work of external providers of relevant services, evaluate the results, draw legal conclusions from them and prevent unnecessary expenses (which may even be the basis of embezzlement accusations against the executive body having the investigations performed).

B. Significance of Legal Privilege

1. Consequences for the practice of internal investigations

Against this backdrop it is decisive for the work of the in-house counsels and the external

[41] *Klaus Moosmayer, in* Interne Untersuchungen, 3 (Klaus Moosmayer & Niels Hartwig 2012).

lawyers involved in the internal investigations whether they can trust that the information obtained by them and the documents prepared by them will remain confidential in the case of investigation proceedings. Extensive protection would be ensured if the legal privileges set out in the StPO (Criminal Proceedings Ordinance) (right to refuse to provide evidence, § 53 Sect. 1 Clause. 1, No. 3; prohibition of seizure, § 97 Sect. 1-3; surveillance prohibition, § 100c Sect. 6 and the restriction of investigation measures in accordance with § 160c StPO) can be claimed.[42] For US proceedings, they would have to be covered by the *Attorney-Client Privilege* or respectively the *Work Product Doctrine* would have to apply.[43] If they can claim these privileges the defense strategy of the testudo takes the desired effect. The company has absolute control over the flow of information to the investigation authorities. The latter cannot gain anything from the internal investigation results without the consent of the company and may not resort to them. In the case of refused cooperation, prosecuting attorneys and police forces have to start from scratch; the key documents may be in the possession of the party subject to professional secrecy.

If in contrast legal privilege is denied, the company loses the protection and the head of the internal investigations will find himself in hot water. On the one hand, he owes his company or employer secrecy and loyalty, on the other hand, as a witness, he is obligated to testify and must do so truthfully and completely; his documents may be seized in the process.[44]

The conception of internal investigations, the question as to who heads them, who is involved and who is not be involved, is thus decisively dependent on the extent of the legal privilege. According to the legal situation in Germany a distinction is to be made between (external) lawyers /defense counsels, in-house counsels and corporate lawyers. This distinction is unknown in the Anglo-Saxon legal tradition. Which model is preferable, which an atavism in the globalized economy?

2. Substance and legitimation of legal privilege

It can be stated in a somewhat simplified manner that legal privilege has a longer tradition than the in-house counsel profession. The corporate lawyer or "Syndikus" has an exceptional position in this context. In the Middle Ages this was regarded as a legal scholar in charge of the legal affairs of the towns or local authorities.[45] It was not until World War I that companies switched to having internal corporate lawyers advise and represent them

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42 cf. see detailed Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 92 ff. (Vol. 1 No. 1 2015), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443.

43 Basics on *Attorney-Client Privilege*: Upjohn Co. v. United States 449 U.S. 383, 389 (1981); on *Work Product Doctrine*: Hickman v. Taylor 329 U.S. 495, 511 (1947).

44 *Rainer Griesbaum,* in Karlsruher Kommentar zur Strafprozessordnung, § 161a No. 4 StPO (Rolf Hannich 7th ed. 2013); cf. *BVerfG: Recht des Zeugen auf einen Rechtsbeistand*, NEUE JURISTISCHE WOCHENSCHRIFT, 103 (1975).

45 The term "Syndicus" is derived from the Greek "sýndikos" (advocate, attorney).

and resorted to external lawyers with less and less frequency.[46] Contrary to the in-house counsel, the corporate lawyer is simultaneously admitted to the bar, a fact which cast doubts on his legal position if he is employed by the company he represents, ever since his emergence.[47] The same was true of the terminology. Whereas up until 2016 the talk was either of *Syndizi*, *Syndikusanwälte* or *Syndikus-Rechtsanwälte*,[48] i.e. a uniform terminology was lacking, the legislator with the Act on the Reorganization of Corporate Counsel Law in 2016[49] introduced the uniform term "Syndikusrechtsanwalt" (§ 46 II BRAO) (roughly: corporate lawyer). According to the legal definition in § 46 Sect. 2 BRAO a corporate lawyer is an employee who practices as a lawyer (as defined by § 46 Sect. 3 BRAO) for his employer who is not a lawyer, patent lawyer or legal firm or patent law firm. For his work, the corporate lawyer must be admitted to the bar pursuant to § 46a BRAO.

In contrast, legal privilege originated in the 16th century in the Anglo-Saxon legal tradition[50] and in Germany as a uniform provision for the right to refuse evidence for the defendant's legal defense counsel and public lawyers in the "Draft of a German Criminal Law Ordinance" of 1874: " For the attorney-client relationship is always based on trust which is entitled to protection of the law and the law may not force the client to conceal specific facts because of the fear that their disclosure could lead to criminal prosecution".[51] The right to refuse evidence for lawyers with regard to information disclosed to them during the exercise of their profession was finally set forth in § 52 No. 3 of the Criminal Procedural Ordinance of the German Empire (1877).

Recognition of the right to refuse evidence or the Attorney-Client Privilege[52] was not to be taken for granted. Only gradually did the attitude gain ground that confidentiality of communication between attorney and client is not only in the individual interest of the parties involved, but also in the interest of administration of justice in general and takes precedence over the possibilities of more extensive investigation of the case. In the Anglo-

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46 cf.: Hans-Jürgen Hellwig, *Der Syndikusanwalt – neue Denkansätze. Die systematische Ausgrenzung des Syndikusanwalts seit 1934,* 1, ANWALTSBLATT, 2 (2015).

47 Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1130 (1992).

48 Cf. Gregor Thüsing & Johannes Fütterer, *Der Syndikus und die Anwaltszulassung nach dem Referentenentwurf des BMJV – Sein oder Nichtsein?* NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 595, 596 (2015).

49 BT-print. 18/5201.

50 In his study Auburn refers to a dozen cases between 1570 and 1580 through which the Attorney-Client Privilege was established, cf. JONATHAN AUBURN, LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY, 2000. In detail: Goeffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, CALIFORNIA LAW REVIEW, 1061, 1070 (1978).

51 CARL HAHN, DIE GESAMMTEN MATERIALIEN ZU DEN REICHS-JUSITZGESETZEN BD. 3, 106 f. (1880/1881).

52 According to an established definition the Attorney-Client Privilege comprises the following legal position: "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.", cf. JOHN H. WIGMORE, WIGMOR ON EVIDENCE § 2292, at 554 (*McNaughton*, revised ed. 1961).

Saxon legal tradition this perspective, which reinforced and established the attorney-client privilege can be traced to a paradigm shift in the derivation of the privilege. The reason for the legal privilege was no longer the "gentleman approach" which traced the lawyer's right to silence and to refuse evidence to "oath and honor of the attorney"[53], but the notion embedded in Utilitarianism that the proceedings must be in accordance with the rule of law and the corresponding general interest in a well-functioning practice of the legal profession.[54] In Germany legal privilege is also an expression of the idea that the lawyer is a legal administration body. In an essential ruling the German Supreme Court expounds[55]:

"The protection of the practice of the legal profession against government control and patronization is not solely in the individual interest of the specific lawyer of the specific client. The lawyer is a *'legal administration body'* whose vocation is to represent the interests of his client. His professional work is in the public interest in effective legal administration in accordance with the principles of the rule of law. Under the principle of the rule of law set out in the Constitution, already on grounds of equal opportunity and procedural equality the citizens are entitled to a legal counsel who they can trust and who they can expect to represent their interests independently, freely and free of self-interest. As the appointed independent advisor and counsel it is incumbent on him to provide comprehensive support to his client.

The prerequisite for fulfilling this task is a relationship of trust between the attorney and the client. Integrity and reliability of the individual member of the profession as well as the right and duty of confidentiality are basic conditions for the development of this trust. Hence, professional secrecy has always been one of the lawyer's fundamental duties."

3. Extent of legal privilege

It can be concluded from this that the lawyer as well as the defense counsel (§ 138 StPO) have a right to refuse evidence as bound to professional secrecy under German Criminal Law § 53 Sect. 1 Nr. 2, Nr. 3 StPO. Protection against circumvention is provided by the right to refuse evidence by paraprofessionals (§ 53a StPO), the seizure prohibition (§ 97 StPO) and the prohibitions on the recording and evaluation of evidence set out in § 160a StPO (as from Jan. 1, 2008) for investigative acts which concern parties subject to professional secrecy who have the right to refuse evidence. Naturally, the particulars of these

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53 JOHN H. WIGMORE, WIGMOR ON EVIDENCE § 2292, at 554 (*McNaughton*, revised ed. 1961).

54 Hunt v. Blackburn 128 U.S. 464, 470 (1988): the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"; Trammel v. United States 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out".

55 *BVerfG: † Geldwäsche durch Strafverteidiger*, NEUE JURISTISCHE WOCHENSCHRIFT , 1305, 1307 (2004).

privileges in internal investigations are contested.[56] The prevalent opinion is that under German Employment Law associates are obligated to provide information in the case of an "interrogation" by private persons even if they incriminate themselves.[57] For members of the representative and supervisory boards this duty is derived from Company Law.[58] Despite the conflict between the duty to provide information and the procedural right to refrain from self-incriminating testimony (interrogation of an employee suspected of an offense), legal practice assumes that the information provided by the employee or executive is at least indirectly of use.[59] Such information may in any case be used to instate investigative proceedings against the party concerned.[60]

With regard to the right to refuse evidence and seizure prohibition it is important who gave the lawyer (or defense counsel) the retainer. If the retainer is from the company the company may release him from the duty of professional secrecy with the consequence that the documents can be seized and evaluated when the accused associate objects.[61] It has not yet been determined if documents such as final reports on the internal investigation are at least not subject to seizure if the investigations are aimed against the company (in connection with the order of forfeiture or imposition of a company fine). Moreover,

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56 Basics: Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, STRAFVERTEIDIGER, 41 (2009); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 508 (2001); Christian Pelz, *Ambiguities in International Internal Investigations*, COMPLIANCE ELLIANCE JOURNAL 14 (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199152; Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74 (Vol. 1 No. 1 2015), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443; Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings,* COMPLIANCE ELLIANCE JOURNAL, 26 (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168.

57 Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378, 378 (2013); Martin Lützeler & Patrick Müller-Sartori, *Die Befragung des Arbeitnehmers – Auskunftspflicht oder Zeugnisverweigerungsrecht?* CORPORATE COMPLIANCE ZEITSCHRIFT, 19 (2011); cf. also: Burkhard Göpfert & Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger". Ein Beitrag zur aktuellen Compliance-Diskussion*, NEUE JURISTISCHE WOCHENSCHRIFT, 1703, 1705 (2008).

58 cf. Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 97 (Vol. 1 No. 1 2015), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443.

59 Important detail questions discussed in the literature have not yet been the subject matter of court rulings such as the question of usability of statements obtained using prohibited interrogation methods within the scope of internal investigations, *see* Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, STRAFVERTEIDIGER, 41 (2009).

60 For example the Municipal Court of Hamburg: " The idea that the authority of the state may not force the subjects of the law to self-incrimination through duties of cooperation and information subject to punishment upon breach and to use the disclosed information to prosecute him is clearly not applicable to the present case in which private persons have entered legal (employment) relationships which may force them to disclose criminal behavior", Margarete Gräfin v. Galen, *LG Hamburg: Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942, 944 (2011); in contrast Hans Theile, *Internal Investigations« und Selbstbelastung*, STRAFVERTEIDIGER, 381, 384 ff. (2011); also Luís Greco & Christian Caracas, *Internal investigations und Selbstbelastungsfreiheit*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 7, 8 ff. (2015).

61 cf. Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 97 (Vol. 1 No. 1 2015), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443.

it is unclear when the protection starts to take effect, i.e. when a protected defense relationship starts. [62] Hence, in conclusion it must be stated that already in the group of lawyers and defense counsels who have a right to refuse evidence, protection of the procured facts against the encroachment of the investigation authorities is only patchy. The testudo strategy only works partially: German Criminal Procedural Law only equips the legionnaires with the round shield (parma), not with the rectangular shield (scutum).

Protection through the said procedural privileges fails entirely where the parties in question are not subject to professional secrecy, but belong to the company (Compliance Officer, associates/Head of Internal Auditing, Corporate Lawyer or an employee of a company specialized in conducting internal investigations (forensic services). According to the legal situation since Jan. 1, 2016 (Act on the Reorganization of Corporate Lawyers Law[63]) this has now also been settled for corporate lawyers. Pursuant to § 53 Sect. 1 Nr. 3 StPO they are explicitly exempt from the right to refuse evidence and the procedural guarantees securing this.[64] The ratio decidendi for this restriction are Criminal Law policy motives. "The ratio decidendi for the restriction of legal privileges is the need for effective criminal prosecution. Inclusion of the corporate lawyers and corporate patent lawyers under the scope of application of §§ 97 and 160a StPO would harbor the risk that relevant evidence would not be available to the investigation authorities." The legislator is following the precedent set by the European Supreme Court in the well-known Akzo/Nobel case.[65] Here, denial of protection of the confidentiality of communication was rejected with the argument that due to his economic dependence on the employer the corporate lawyer does not have the same freedom as the external lawyer. The consequences of the exclusion of corporate lawyers from legal privileges in practice are radical: An associate who discloses information to a corporate lawyer (often the corporate lawyer and Head of Compliance are the same person) cannot rely on confidentiality. The corporate lawyer may be interrogated as a witness, his documents are subject to seizure.
The case is entirely different in the US. There it has been initially acknowledged as the

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62 According to the Municipal Court of Gießen, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUESTRAFRECHT, 409, 409 f. (2012), the seizure prohibition set out in § 97 Sect. 1 Nr. 1 StPO "also applies to defense documents prepared for the formal instatement of investigation proceedings", for more details see: Stefan Rütters & Anne Schneider, *Die Beschlagnahme anwaltlicher Unterlagen im Unternehmensgewahrsam*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT, 160 (2014).

63 BT Drucks. 18/5201

64 Regarding the legal situation prior to Jan. 1, 2016, cf. Winfried Hassemer, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 1 (1986), Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1129 (1992), Claus Roxin, *Das Beschlagnahmeprivileg des Syndikusanwalts im Lichte der neuesten Rechtsentwicklung,* NEUE JURISTISCHE WOCHENSCHRIFT, 17 (1995) and Konrad Redeker, *Der Syndikusanwalt als Rechtsanwalt,* NEUE JURISTISCHE WOCHENSCHRIFT, 889 (2004).

65 EuGH, (European Supreme Court) ruling of Sept. 14, 2010, C-550/07. P. Hustus, rightly points out that this ruling only concerned the European anti-trust proceedings and was not necessarily capable of being extrapolated to the StPO, Ludmila Hustus, *Der Syndikusanwalt und das Legal Privilege respektive das Anwaltsprivileg – alea iacta est*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 65 (2016); detailed reconstruction of the ruling and the underlying facts of the case in: Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 369 ff. (2011).

flipside of Corporate Criminal Law since the Upjohn ruling by the Supreme Court in 1981[66] that legal privilege does not only apply to natural, but also to legal entities:

"Admittedly complications in the application of the privilege arise when the client is a corporation, which, in theory, is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation."[67] From this point on, it is now a foregone conclusion that attorney-client privilege applies to the corporation,"[68]

and that there is no difference between an in-house counsel and external lawyer or defense counsel[69]. The arguments that the corporate lawyer[70] is economically dependent and subject to the duty to follow his employer's instructions have been deemed untenable for justifying a distinction between the two professional groups: "[t]hese are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege." [71] Therefore, attorney-client privilege technically applies equally to in-house and external counsel, as the "lawyer's status as in-house counsel 'does not dilute the privilege." [72]

Within the context of the emergence of internal investigations it was then contested however, who the attorney's client is and accordingly who can decide on the exercise and grant of the privilege. According to the "Control Group Test" the status of the associate disclosing information to the internal or external lawyer is decisive. [73]According to this, the privilege applies to the extent that the associate can implement legal counsel provided on

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66 In detail: John E. Sexton, *A Post-UPJOHN consideration of the corporate attorney-client privilege*, NEW YORK UNIVERSITY LAW REVIEW, 443 (1982); cf. also Gerald F. Luttkus, *Implications of Upjohn Symposium: The Role of Professionals in Corporate Governance: Note*, 57, NOTRE DAME LAW REVIEW, 887 (1981); Lucian E. Dervan, *Internal Investigations and the Evolving Fate of Privilege*, COMPLIANCE ELLIANCE JOURNAL, 3, 5 (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199145.

67 Upjohn Co. v. United States 449 U.S. 389-390 (1981).

68 CFTC v. Weintraub 471 U.S. 343, 348 (1985): "It is by now well established, and undisputed by the parties to this case, that the attorney-client privilege attaches to corporations as well as to individuals."

69 Grace G. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, UNIVERSITY OF MIAMI LAW REVIEW, 109, 140 (2010), the article refers to rulings by district courts in which even non-lawyers are subject to the protection of privilege; for the distinction between Inhouse Counsel and external lawyer or defense council with the example of the *Bank of China* case *see* also Lucian E. Dervan, *Internal Investigations and the Evolving Fate of Privilege*, COMPLIANCE ELLIANCE JOURNAL, 3, 10 (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199145.

70 United States v. United Shoe Machinery Corp. 89 F.Supp 357, 358-359 (D. Mass.1950).

71 United States v. United Shoe Machinery Corp. 89 F.Supp 357, 358-359 (D. Mass.1950).

72 In re Kellogg Brown and Root, 756 F.3d; cf. also Lucian E. Dervan, *Internal Investigations and the Evolving Fate of Privilege*, COMPLIANCE ELLIANCE JOURNAL, 3, 6 (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199145; Michele DeStefano describes the difference between the in-house counsel and the compliance professional: Michele DeStefano, *The Chief Compliance Officer - Should there be a new "C" in the C-Suite?,* THE PRACTICE (July 2016), retrievable at: https://thepractice.law.harvard.edu/article/the-chief-compliance-officer/.

73 City of Philadelphia vs. Westinghouse Electric. Crop, 210 F. Supp. 483, 485 (E.D. Pa. 1962)

the basis of his representation of the facts of the case as a business decision. From a different standpoint, the subject matter of the associate's statement is decisive ("Subject Matter Test"[74]). Where communication takes places at the instruction of a body of the company looking for legal counsel for the company and the associate's statement refers to his duties under Employment Law, the privilege applies.

The difference between the two approaches lies primarily in the question of the involvement of associates from lower hierarchy levels in the privilege's scope of protection. The lowest common denominator can be found in the distinction between business and legal advice. Privilege only exists where legal counsel, but not merely business advice is being sought[75]. In more recent case law on the issue of the distinction between business and legal advice the "but for" is partially relied on[76]. According to this it must be proven that the communication has the purpose of obtaining legal counsel: "the communication would not have been made 'but for' the fact that legal advice was sought."[77] Only in this case does the privilege apply. According to the other standpoint it is merely necessary that legal advice be obtained, among other things.[78] A final ruling by the Supreme Court on this issue is still pending.

In the Upjohn ruling by the Supreme Court the Control Group approach is abandoned as a distinction criterion for the extent of protection of the privilege. The status of the employee is not decisive, as valuable information may be provided by associates at all hierarchy levels who are thus worthy of protection. Where protection of confidentiality is denied there is a risk that interrogation of employees outside of the Control Group will be refrained from on procedural grounds in the investigation. This is incompatible with the nature and purpose of the attorney-client privilege and its fundamental significance for legal proceedings based on the principles of the rule of law.[79] The Supreme Court

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74 Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-492 (7th Cir. 1970), confirmed by 400 U.S. 348 (1971).

75 Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 605 (8th Cir. 1978). The distinction between Business and Legal Advice needs a thorough examination. In particular in the case of corporate lawyers it is not clear that legal advice is being sought: Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys representing Corporations*, MERCER LAW REVIEW, 1169 (1997); Michele DeStefano, *The Chief Compliance Officer - Should there be a new "C" in the C-Suite?,* THE PRACTICE (July 2016), retrievable at: https://thepractice.law.harvard.edu/article/the-chief-compliance-officer/.

76 In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

77 United. States ex rel. Barko v. Halliburton Co. No. 05-cv-1276, 2014. WL 1016784 (D.D.C. Mar. 6, 2014).

78 In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

79 The significance of the privilege is highlighted as follows: "The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." cf. Upjohn Co. v. United States 449 U.S. 389 (1981).

then makes it clear that in the case where internal investigations are ordered for the purpose of providing legal counsel, the sole client is the company. According to this, only the company bodies can release parties from the duty of confidentiality. According to the Supreme Court this can lead to misunderstandings in the interrogation of the associates. Accordingly, a caveat is necessary following the ruling by the Supreme Court (Upjohn warning) comprising the following elements and the disregard of which can entail an evidence evaluation prohibition: [80]

"the attorney represents the corporation and not the individual employee; the interview is covered by the attorney-client privilege, which belongs to and is controlled by the corporation, not the individual employee; the corporation may decide, in its sole discretion, whether to waive the privilege and disclose information from the interview to third parties, including the government." [81]

Thus the two jurisdictions, Germany and the US arrive at different results when determining the extent of legal privilege. In the US there is extensive protection of communication within the scope of the internal investigation without taking into consideration whether the investigation is being performed by a corporate lawyer or an external lawyer. This consolidates the position of the company. As the master over the privilege the company can decide whether and to what extent it releases its legal counsel from the duty of secrecy and discloses information on corporate misconduct. The US works with the carrot, Germany with the stick. If the company cooperates with the investigation authorities in the US and discloses all information obtained without reservations, the sentence will be lighter in accordance with the sentencing guidelines[82]. In Germany it is unclear if cooperation is rewarded as the efforts in the Compliance sector do not necessarily extend to company fines or the forfeiture order[83]. Where there is no cooperation and open communication with the prosecuting attorney the investigation authorities will use coercive

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80 U.S. v. Nicholas 606 F. Supp. 2d 1109, 1112 (C.D. Cal.); lifted on other grounds: United States v. Ruehle 583 F.3d 600 (9th Cir. 2009); but cf.: In Re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005).

81 Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 379 f. (2011).

82 A points system is used for determining the severity of the sentence which is reduced by 2 to 5 points depending on the extent of the company's cooperation. Chapter 8 Section (g) "Self-Reporting, Cooperation and Acceptance of Responsibility" of the Federal Sentencing Guidelines states: "(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, *fully cooperated in the investigation*, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or (2) If the organization *fully cooperated in the investigation* and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; ..." [bold type by the author], retrievable at: http://www.ussc.gov/guidelines-manual/2011/2011-8c25.

83 Convenient overview at: Imme Roxin, *Probleme und Strategien der Compliance-Begleitung in Unternehmen*, STRAFVERTEIDIGER, 116, 117 f. (2012); regarding cooperation cf. Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings,* COMPLIANCE ELLIANCE JOURNAL, 26, 52 f. (Vol. 2 No. 1 2016), retrievable at: http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168.

measures in the investigation proceedings and procure the necessary information. As expounded above, this is justified primarily with a Criminal Law policy argument. No strong defense positions and privileges may be conceded to the strong company, or else the investigation will come to naught.

C. Expedient Corrections

According to the stance taken here the legislative ruling to exclude corporate lawyers from legal privilege if they work as a lawyer for the company is inconsistent and dubious from the aspect of Criminal Law policy. [84] It therefore behooves correction de lege lata through a teleological reduction of § 53 Sect. 1 Nr. 3 StPO. De lege ferenda cancellation of the restriction set out in § 53 Sect. 1 Nr. 3 StPO and thus a partial equalization of the legal situation in German with that in the US is advisable. In contrast, the ruling by the German legislator to exclude other company lawyers from legal privilege is accurate. However, the extent of privilege to legal professionals not admitted to the bar in accordance with the legal situation in the US is alien to the system, at least according to the legal understanding here.

§ 53 StPO and the privileges of the defense counsel and lawyers securing it have the primary purpose of protecting the relationship of trust between the person of trust and the party obtaining legal advice. As already expounded, the attorney/defense counsel privilege also protects the public interest in criminal justice administration based on the rule of law and procedural equality and intends to ensure that parties seeking counsel are not hindered from providing complete information to the person of trust because they fear that he has to disclose the entrusted information. [85] Moreover, the party subject to professional secrecy is also to be protected from the coercive situation of keeping confidentiality with regard to the client in conflict with cooperation in the investigation[86].

The reorganization of the law concerning corporate lawyers recognizes that the corporate lawyer provides legal counsel to his employer and rightly identifies this as the work of a lawyer. Accordingly, the legislator declares the aspect of the lack of economic independence of the corporate lawyer, formerly decisive for denial of legal privilege, as irrelevant

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[84] Regarding the extension of legal privilege to the corporate lawyers, cf. already Christian Burholt, *Ein Schritt vor, zwei zurück – Gilt das Anwaltsprivileg im europäischen kartellrecht auch für Syndikusanwälte?*, 3, BUNDESRECHTSANWALTSKAMMER-MITTEILUNG, 100, 102 (2004).

[85] Spaulding stresses this using a metaphor from the healthcare sector: "the patient cannot hope to receive adequate treatment without revealing her symptoms, she is obliged to be full and frank in order to receive effective service", Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege*, AMERICAN BAR ASSOCIATION JOURNAL OF THE PROFESSIONAL LAWYER, 135, 159 (2013).

[86] *Lothar Senge, in* Karlsruher Kommentar zur Strafprozessordnung, § 53 StPO No. 1 (: Rolf Hannich 7th ed. 2013); GERD PFEIFFER, STRAFPROZESSORDNUNG, § 53 StPO, No. 1 (5th ed. 2005); ROBERT MAGNUS, DAS ANWALTSPRIVILEG UND SEIN ZIVILPROZESSUALER SCHUTZ, 22 ff., 30 ff. (2010); Ludmila Hustus*, Der Syndikusanwalt und das Legal Privilege respektive das Anwaltsprivileg – alea iacta est*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 65, 70f. (2016).

and applies the distinction between business and legal advice customary in Anglo-Saxon legal systems, as can be concluded from the legal definition of the functions of a lawyer. Because (with the exception of § 46 Sect. 3 Nr. 3, 4 BRAO) only "the examination of legal issues including solving of the case as well as elaborating and evaluating potential solutions and providing legal advice" is counted among the professionally independent and autonomous functions which are a constituent element of the work of a lawyer and thus not provision of exclusively economic advice to the company. It would be logical to allow the right to refuse evidence according to §53 StPO including the privileges secured by it for provision of legal advice on Criminal Law, which likewise can fall under the definition of lawyer's work in the same way as for external lawyers[87]. Because the initial situation is identical in this regard: The corporate lawyer providing legal counsel commands trust, is dependent on complete communication of the facts of the case in order to provide legal advice and requires protection himself from the conflict of interests depicted above. US Criminal Law, normally regarded as being "on top of it", recognizes this whereas the German legislator apparently does not.

If the similar initial situation of external lawyers and of corporate lawyers as presented is to be accounted for, there are two different solution approaches. It is at first expedient to interpret the restriction in the scope of application of the right to refuse evidence as a procedural securing of the prohibited action in § 46c Sect. 2 BRAO. According to this corporate lawyers "in penalty or fine proceedings against the employer or his associates" "may not act as their defense or representative, this applies where the subject matter of the penalty or fine proceedings is a company-related offense accusation, also with regard to work as a lawyer as defined by § 4." Accordingly, § 53 Sect. 1 Nr. 3 StPO can be interpreted to the effect that the restriction of the right to refuse evidence only applies where the corporate lawyer acts in breach of § 46c BRAO but not when he merely provides legal advice internally to the employer with regard to facts relevant to a case in Criminal Law which he is solving.

The other possibility of securing the relationship of trust consists in recourse to § 53a StPO. If the term paraprofessional is interpreted broadly, which cannot be excluded from the wording of § 53a StPO, [88] the corporate lawyer can also be included under this provision which in accordance with § 53 Sect. 1 Nr. 3 StPO does not explicitly remain unaffected. [89] In this way the important coordinating work of the corporate lawyer in the case of management of the internal investigations by an external party subject to professional

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87 Also agreed on by Winfried Hassemer, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 1 (1986); Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1129 (1992); Konrad Redeker, *Der Syndikusanwalt als Rechtsanwalt,* NEUE JURISTISCHE WOCHENSCHRIFT, 889 (2004) on the legal situation prior to the Act on the Reorganization of the Law on Corporate Lawyers 2016.

88 *Lothar Senge, in* Karlsruher Kommentar zur Strafprozessordnung, §53a StPO No. 2 (Rolf Hannich 5th ed. 2013); GERD PFEIFFER, STRAFPROZESSORDNUNG, §53a StPO No. 1 (5th ed. 2005); TIDO PARK, DURCHSUCHUNG UND BESCHLAGNAHME, No. 547 (3rd ed. 2015).

89 BT-Drs. 18/5201, 40.

secrecy would be protected, reinforcing the testudo formation in this empirically relevant area. There is no reason today for the general weakening of his position in relation to the external lawyer on grounds of economic policy. The recourse to corporate lawyers may have made sense in the First World War era by sustainably keeping freelance lawyers away from corporate clients[90] – but nowadays this context is certainly not verifiable.

The restriction set out in § 53 Sect. 1 Nr. 3 StPO advocated here to correct the depicted inconsistency is also not pertinent from the aspect of Criminal Law policy. Forced disclosure of information and the confiscation of documents will entail tactical circumventive maneuvers which make it more difficult instead of easier to ascertain the facts of the case. Informed companies will resort to external counsel from the start or take other measures to foil access to the relevant documents. This undermines the cooperative approach which the investigation authorities depend on not least due to their limited resources and limits prevention because the corporate lawyer, who may act as the "legal conscience" [91] of a company is excluded on procedural grounds in the case of suspicion and consequently cannot draw any conclusions for improvement of the Compliance Management system from the case. For this reason, in awareness of the legal situation in Germany it is even advised in the US to reduce the number of personnel in the Legal Department of the company and to rely exclusively on consulting by external lawyers. [92]

However, the present plea for assumption of the American Way[93] does not extend to including the company lawyer who is not admitted to the bar or is admitted as a corporate lawyer according to the new legislation (§ 46a BRAO) under the protection of § 53 StPO. De lege lata there is no dogmatic leeway. Even de lege ferenda the differences between the corporate lawyer not admitted to the bar and the corporate lawyer admitted to the bar are factors in favor of the current procedural distinction. The corporate lawyer not admitted to the bar may also provide legal advice. But it depends on the individual case to what extent he provides the advice independently. Professional independence is the key to trust in legal advice that is worthy of protection and thus a constituent element for application of legal privilege.

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90 Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1129, 1131 (1992).

91 cf. the well-known case of the Compliance Officer ruling by the German Supreme Court (BGHSt 54, 44 ff.), in detail: Hendrik Schneider & Peter Gottschaldt, *Offene Grundsatzfragen der strafrechtlichen Verantwortlichkeit von Compliance-Beauftragten in Unternehmen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 573 (2011).

92 Andrew R. Nash, *In-House but out in the Cold: A Comparison of the Attorney-Client Privilege in the United States and European Union*, ST. MARY'S LAW JOURNAL, 453, 492 (2012); with reference to the Akzo Nobel ruling by the: "For corporations operating on both sides of the Atlantic Ocean, there appears little value in maintaining large in-house legal departments in any European offices".

93 The extent of legal privilege in US law is naturally not uncontested, cf. the summary of the arguments "against confidentiality" on the basis of an economic analysis of the law (without reference to internal investigations) in Dru Stevenson, *Against Confidentiality*, UC DAVIS LAW REVIEW, 337, 403 (2014): "The rules undermine the other ethical rules that call for candor, integrity, and fairness; they undermine public confidence in the legal system; and they undermine transparency trust in general through lemons effects".

D. Conclusion

The imponderables of current Criminal Business Law create a demand for legal advice which should be subject to clear procedural rules and competences. Analysis of the legal framework conditions for internal investigations has proven that currently this is not the case. The legal situation in Germany is already not transparent, partly inconsistent and diversified. This is especially true of national procedures and the corresponding Cross-Border Internal Investigations in which even lawyers' professional duty of secrecy can conflict with the duty to disclose information under Criminal Law.[94] Criminal Business Law already acts as an obstacle to growth[95] nowadays, as economic decisions first need to be secured through Compliance and Legal, a cumbersome process. The flipside of this development is at least the securing of trust in the lawyers providing advice, internal as well as external. Companies need a safe harbor to navigate these waters. The present approach which stabilizes the tactics of the testudo at least in one detailed area and represents a certain counterweight to the encroaching risk of companies from unpredictable Criminal Business Law serves this purpose.

[94] Concise presentation of the most important legal issues in Christian Pelz, *Ambiguities in International Internal Investigations*, COMPLIANCE ELLIANCE JOURNAL, 14 (Vol. 2 No. 1 2016).

[95] Hendrik Schneider, *Wachstumsbremse Wirtschaftsstrafrecht,* 1, NEUE KRIMINALPOLITIK, 30 (2012).